STATE OF MICHIGAN

COURT OF APPEALS

RUTHVYN J. FREDERICK and ALLAN REMY,

Plaintiffs-Appellees,

v

U.S. ICE CORP.,

Defendant-Appellant,

and

HASANI HAMADI-ZOMA DEBROSSARD,

Defendant.

UNPUBLISHED
August 9, 2005

No. 254336
Wayne Circuit Court
LC No. 02-238844-NI

Before: Sawyer, P.J., and Markey and Murray, JJ.

MARKEY, J., (dissenting),

I respectfully dissent.

I believe the trial court abused its discretion when it precluded Dr. Buszek from testifying on behalf of defendant as an expert medical witness.

My review of the record indicates that, by no means, was this a situation where defendant was in any way dilatory or negligent in its discovery request so that its belated discovery of Dr. Buszek as an "examining physician" was so egregious as to warrant being denied the ability to call him as a witness at trial. Indeed, the record indicates that the defense lawyer in fact subpoenaed plaintiffs' medical records two separate times. The first time the records were requested, Dr. Buszek had not yet seen or evaluated either of the plaintiffs. However, defendant also submitted interrogatories to plaintiffs which, again, asked for the identity of any and all treating and examining physicians. Plaintiffs did not reveal Dr. Buszek, although, obviously, they both knew that Dr. Buszek had examined them. Moreover, neither did they supplement the interrogatory answers, for which they clearly had a duty. Dr. Buszek's testimony was not favorable to plaintiffs, which is one of the arguments that plaintiffs' attorney used in his effort to preclude Dr. Buszek from testifying. He specifically stated that the doctor would be naturally biased against plaintiffs because he was retained and paid by Titan, the plaintiffs' no-fault carrier.

Additionally, defendant took the deposition of both plaintiffs and covered the same territory during his questioning – i.e., he asked plaintiffs about all of their treating and medical examinations. Again, neither plaintiff disclosed that he had seen Dr. Buszek, though, of course, each knew that that had occurred.

Also, as is frequently the case, defendant's witness list set forth that it would possibly call any and all treating and examining physicians. This is standard language used for decades by attorneys so as to prevent the type of situation which occurred here. It is hard to fathom what prejudice or surprise could befall plaintiffs for allowing a doctor who examined them to testify. Plaintiffs and their attorney are those that should be charged with knowledge of his examination. The fact that they apparently tried to conceal and, in fact, succeeded in doing so strikes me as patently unfair, particularly in view of the fact that the defense attorneys here conducted an appropriate amount of discovery and "asked all the right questions."

I certainly agree that a trial court has wide latitude in imposing sanctions; however, the most drastic sanctions should be carefully considered and imposed only where the conduct warrants it. Here, there was simply no way for defendant to know of the existence of Dr. Buszek if plaintiffs failed to reveal him and if the records which it had already subpoenaed did not contain any reference to his examination. There was no history whatsoever of any discovery abuses by defense counsel, so to disallow such an important witness during trial seems to me to clearly be an abuse of discretion.

I would reverse and remand for a new trial during which Dr. Buszek's testimony would be allowed. We do not retain jurisdiction.

/s/ Jane E. Markey